MUNIANDY SUBRAYAN & ORS.

v.

CHAIRMAN AND BOARD MEMBERS, KOPERASI MENARA MAJU BHD.

COURT OF APPEAL, KUALA LUMPUR
MAHADEV SHANKAR JCA
ABU MANSOR ALI JCA
ABDUL MALEK AHMAD JCA
[CIVIL APPEAL NO: B-02-608-1995]
22 AUGUST 1996

CIVIL PROCEDURE: *Pleadings - Striking out - Alleged defect in statement of claim - Whether calling for striking out of entire action - Whether could be amended - Order 18 r. 19 Rules of the High Court 1980 - Power to strike out pleadings - Whether discretionary - Whether to be judiciously exercised.*

The appellants, who were members of the Board of the Koperasi Menara Maju Bhd., had their membership suspended after having a dispute with the other members of the Board. Sections 49(1) and 49(2) of the Cooperative Societies Act 1948 ('the Act') stipulate that such dispute must first be referred to the Registrar-General, who may decide the dispute himself, refer it to arbitration or require that the parties refer the dispute to Court. The appellants referred the dispute to the Registrar-General as required, but soon after, without waiting for the latter's direction, filed a Court action against the respondent, the Chairman and the Board members of the Koperasi. This action, as it was, was struck out by the Court for want of jurisdiction to entertain it. The Registrar-General, meanwhile, had directed that the dispute be referred to the Court, and notified the parties of the decision. Subsequent to the direction, a second action was however filed by the appellants. The respondent accordingly filed the defence, and later, following a summons for direction, an Agreed Bundle of Documents was filed by the parties. In the bundle, *inter alia*, was filed the Registrar-General's Certificate which directed the parties to refer the dispute to the Court.

The facts showed that in their statement of claim, the appellants did not aver that the dispute had been referred to the Registrar-General, or that a direction had been given by the latter for the matter to be referred to the Court. The respondent did not plead this point in their defence, but nonetheless raised a preliminary objection that because compliance with s. 49(2)(c) of the Act had not been specifically pleaded in the statement of claim, the entire action should be struck out. The learned Judge allowed the objection, and so struck the action out. This is the appellants' appeal.

Held:

Per Mahadev Shankar JCA (delivering the judgment of the Court):

[1] With all due respect to the trial Judge, if he thought that it was imperative that the statement of claim should plead compliance (notwithstanding that the fact of compliance was already on record by way of agreed document), he should have directed that the claim be amended.

[2] Striking out pleadings under O. 18 r. 19 Rules of the High Court 1980 is a discretionary power to be exercised according to the justice of the case. The *Supreme Court Practice* is replete with judicial precedents to show that this was not a case for striking out and forensic courtesy should have persuaded Counsel for the defendant to inform the Judge that the point was a non-starter. More so as it had not been properly pleaded as a defence.

[3] It is with great regret that we have to order that costs of this appeal and costs of the day of the trial and the written submissions in the Court below to be taxed and paid by the appellants to the respondent. We do this because the appellants/plaintiffs should immediately have amended their statement of claim when the objection was made known to them. In any case, they are given three weeks to accordingly amend their statement of claim.

[Appeal allowed. Order accordingly.]

*[**Bahasa Malaysia** Translation of Headnotes]*

PROSEDUR SIVIL: *Pliding - Pembatalan - Ketidak-sempurnaan dalam penyataan tuntutan - Samada menuntut pembatalan keseluruhan tindakan - Samada boleh dipinda - Aturan 18 k. 19 Kaedah-kaedah Mahkamah Tinggi 1980 - Kuasa untuk membatalkan pliding - Samada merupakan suatu budibicara - Samada hendaklah dilaksanakan menurut kehakiman.*

Perayu-perayu, yang merupakan ahli-ahli Lembaga Koperasi Menara Maju Bhd., telah digantung keahlian mereka selepas berlaku satu pertikaian dengan ahli-ahli yang lain Lembaga tersebut. Seksyen 49(1) & (2) Akta Pertubuhan Koperasi 1948 ('Akta tersebut') menetapkan bahawa pertikaian yang sedemikian, mestilah pertamanya dirujukkan kepada Ketua Pendaftar, yang mungkin boleh memutuskan pertikaian itu sendiri, merujukkannya kepada penimbangtara atau meminta pihak yang berkaitan merujuk pertikaian itu ke Mahkamah. Perayu telah merujuk pertikaian itu kepada Ketua Pendaftar sepertimana yang dikehendaki, tetapi sejurus selepas itu, tanpa menanti arahan pihak terkemudian, telah memfailkan tindakan Mahkamah terhadap responden

iaitu, Pengerusi dan ahli-ahli Lembaga Koperasi itu. Tindakan ini, sepertimana keadaannya, telah dibatalkan oleh Mahkamah kerana ketiadaan bidangkuasa untuk mendengarnya. Ketua Pendaftar, sementara itu, telah memberikan arahan supaya pertikaian itu dirujukkan kepada Mahkamah, dan sekaligus memberitahu pihak-pihak berkenaan tentang keputusan itu. Akibat arahan itu, suatu tindakan yang kedua telah difailkan oleh perayu-perayu. Responden berikutan itu telah memfailkan pembelaan, dan kemudiannya, berikutan dengan satu saman untuk arahan, satu Ikatan Dokumen Yang Telah Dipersetujui telah difailkan oleh pihak-pihak tersebut. Dalam ikatan ini, antara lainnya, telah difailkan Perakuan Ketua Pendaftar yang mana mengarahkan pihak-pihak terbabit untuk merujukkan pertikaian mereka kepada Mahkamah.

Fakta menunjukkan bahawa dalam pernyataan tuntutan mereka, perayu tidak menegaskan bahawa pertikaian itu telah dirujuk kepada Ketua Pendaftar, atau bahawa satu arahan telah diberikan oleh Ketua Pendaftar untuk merujukkan halperkara tersebut kepada Mahkamah. Responden tidak memplidkan perkara ini dalam pembelaan mereka, tetapi telah membangkitkan satu bantahan awal bahawa, disebabkan pematuhan kepada s. 49(2)(c) Akta tidak diplidkan secara khusus dalam pernyataan tuntutan maka keseluruhan tindakan itu seharusnya dibatalkan. Hakim yang bijaksana membenarkan bantahan ini dan dengan sebab itu telah membatalkan tindakan itu. Ini adalah rayuan perayu.

Diputuskan:

[1] Dengan segala hormat kepada Hakim perbicaraan, jika beliau berpendapat adalah sangat penting bahawa penyataan tuntutan itu seharusnya memplidkan pematuhan (walaupun fakta tentang pematuhan telah tercatat dalam dokumen yang dipersetujui), beliau seharusnya mengarahkan supaya tuntutan itu dipinda.

[2] Membatalkan pliding di bawah A. 18 k. 19 Kaedah-kaedah Mahkamah Tinggi 1980 adalah suatu kuasa budibicara yang harus dilaksanakan menurut keadilan kes. Amalan Mahkamah Agung dipenuhi dengan duluan kehakiman yang menunjukkan bahawa ini bukannya merupakan satu kes untuk dibatalkan dan kecermatan budi bahasa seharusnya mempengaruhi Peguam bagi pihak defendan untuk memaklumkan kepada Hakim bahawa halperkara yang dibangkitkan itu adalah sesuatu yang sia-sia. Lebih-lebih lagi kerana ianya telah tidak diplidkan sebagai pembelaan.

[3] Kami dengan dukacitanya terpaksa memerintahkan bahawa kos rayuan ini dan kos bagi hari perbicaraan dan penghujahan bertulis dalam Mahkamah dibawah hendaklah ditetapkan dan dibayar oleh perayu-perayu kepada responden. Kami melakukan perkara ini kerana perayu-perayu/plaintif-plaintif seharusnya telah segera meminda penyataan tuntutan mereka ketika

bantahan diketahui oleh mereka. Dalam apa keadaan pun, mereka diberi tempoh selama tiga minggu untuk meminda pernyataan tuntutan mereka sekadarnya.

[Rayuan dibenarkan. Perintah sekadarnya.]

Legislation referred to:
Cooperative Societies Act 1948, ss. 49(1)(c), 49(2), (2)(c)
Rules of the High Court 1980, O. 18 r. 19

For the 1st, 2nd, 4th, 5th appelants/plaintiffs - Sathwan Kaur; M/s. Dusing & Co.
For the respondents/defendant - N. Mohanadas; M/s. N. Mohanadas & Assoc.

JUDGMENT

Mahadev Shankar JCA:

The appellants were members of the Board of the Koperasi Menara Maju Bhd. ('the Koperasi') which was at all material times and still is a Cooperative Society registered under and governed by the Cooperative Societies 1948 ('the Act').

In September and October 1988 differences arose between the appellants on the one hand and the chairman and other members of the Board of the Koperasi; which culminated in the purported suspension of the plaintiffs on 16 September 1988 being placed before the delegates extraordinary general meeting which purportedly expelled the plaintiffs from the Koperasi.

Section 49(1)(c) of the Act provides that if any dispute touching the business of a registered society arises between the society or its Board and any officer of the society, such dispute shall be referred to the Registrar-General for decision.

Section 49(2) of the Act reads:

> (2) The Registrar-General may, on receipt of a reference under sub-s. (1):
>
> (a) decide the dispute himself;
>
> (b) refer it for disposal to an arbitrator or arbitrators; or
>
> (c) require the parties concerned to refer the dispute to a Court.

The plaintiffs referred to the Registrar-General by a letter dated 9 November 1988. (See **Appeal Record ('AR') 78**). The Registrar-General replied on 23 November 1988 directing the dispute to be referred to the Court (see **AR 25**). It is to be noted that a copy of this letter was extended by the Registrar-General both to the Chairman and the Secretary of the Koperasi.

Unfortunately the plaintiffs had filed an Originating Summons No. 31-115-88 in the High Court at Kuala Lumpur on 17 November 1988 **(the first action)** before the Registrar-General's letter was issued. The Court therefore had no jurisdiction to entertain the first action and it was struck out for this reason on 24 October 1989.

So the plaintiffs filed this action No. 22-101 of 1989 in the High Court at Shah Alam on 5 December 1989 to implement the direction of the Registrar-General and ventilate the merits of the dispute in the Court. After entering appearance, the defendant filed a statement of defence. Nowhere in this defence was it pleaded that this action should not be entertained because the plaintiffs had not complied with s. 49(1) and (2) of the Act. Indeed, if such a plea had been raised, it would have been an abuse of process because the defendant knew that these provisions had been complied with. Nor was it pleaded in the defence that this action should be struck out because the plaintiffs had not specifically averred in their statement of claim that the dispute had been referred to the Registrar-General and that he had directed under s. 49(2)(c) of the Act that the dispute be referred to the Court.

A summons for directions followed. The parties then filed a bundle of pleadings and also an **Agreed Bundle of Documents**. The Registrar-General's letter of 23 November 1988 accompanied by his certificate that he had directed the parties to refer the dispute to Court, as provided by s. 49(2)(c) of the Act, was in this Agreed Bundle of Documents. In other words there was uncontested material before the Court that s. 49(2)(c) of the Act had been complied with.

In spite of this, the defendant took a preliminary objection that because compliance with s. 49(2)(c) of the Act had not been specifically pleaded in the statement of claim, the entire action should be struck out.

Both parties were directed to file written submissions. Plaintiffs' Counsel pointed out that the first action was struck out on technical grounds and therefore not *res judicata*, and more importantly, that s. 49(2)(c) had been complied with. He had referred to the Registrar-General's Certificate in the Agreed Bundle of Documents which by then had been tendered to the Court and therefore needed no further proof.

Alas, the learned Judge agreed with the Counsel for the defendant and struck out the action!

With all due respect to the trial Judge, if he thought that it was imperative that the statement of claim should plead compliance, (notwithstanding that the fact of compliance was already on record by way of an agreed document), he should have directed that the claim be amended. Striking out pleadings under

O. 18 r. 19 of the Rules of High Court 1980 is a discretionary power to be exercised according to the justice of the case. The *Supreme Court Practice* is replete with judicial precedents to show that this was not a case for striking out and forensic courtesy should have persuaded Counsel for the defendant to inform the Judge that the point was a non-starter. All the more so as it had not been properly pleaded as a defence.

For reasons not clear to us, this action took six years to come to trial. Despite the passage of time, appellants' Counsel informed us that the issues are still alive. We therefore remitted the matter back to the High Court for trial before another Judge.

It is with great regret that we ordered the costs of this appeal and the costs of the day of the trial and the written submissions in the Court below to be taxed and paid by the appellants to the respondent but only in any event and upon conclusion of the action in the Court below, and for the deposit to be paid to the respondent towards those costs. We did this because we thought that the plaintiffs should immediately have amended their statement of claim when the objection was made known to them. We also gave the appellants three weeks to amend their statement of claim accordingly.

We hope, however, that time in her role as the great healer will ensure that better counsel will prevail and the parties will be able to resolve their differences without straining the limits of the litigation process.

Reported by W.A. Sharif